

Final Report

June 29, 2007

Availability and Disparity Study

California Department of Transportation

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SECTION ES.

Executive Summary

The California Department of Transportation (Caltrans) must implement the Federal Disadvantaged Business Enterprise (DBE) Program in order to receive U.S. Department of Transportation funds (49 CFR Part 26). Recent legal decisions and guidance from USDOT have led Caltrans to reexamine how it implements the Program.

In 2005, the Ninth Circuit Court of Appeals in *Western States Paving v. Washington State DOT* held that the Federal DBE Program enacted by Congress was constitutional but ruled that Washington State DOT's implementation of the Program was unconstitutional. The court held that state and local governments are responsible for determining whether or not there is discrimination in the local transportation contracting industry, and for developing narrowly tailored measures if a need exists, in order to comply with the Federal DBE Program.

This court decision and federal regulations affect Caltrans' implementation of the Federal DBE Program in California. Caltrans must set an overall annual goal for DBE participation in Caltrans' federally-funded contracts and examine whether or not the annual DBE goal can be attained solely through neutral measures or whether race- or gender-based measures are needed. If it chooses to implement race- and gender-conscious measures, such as DBE contract goals, Caltrans must determine the share of the overall DBE goal that will be met through race- and gender-based measures and the specific race, ethnic and gender groups that will be eligible for these elements.

Availability and Disparity Study

Caltrans retained BBC Research & Consulting (BBC) to conduct an Availability and Disparity Study to assist Caltrans in its implementation of the Federal DBE Program. BBC examined the transportation construction and engineering industry in California and related contracts awarded by Caltrans or with funds administered by Caltrans. BBC examined more than 10,000 construction and engineering contracts and subcontracts from 2002 through 2006 for both Caltrans and local agencies. To examine relative availability of minority- and women-owned firms (MBE/WBEs) for this work, more than 18,000 California business establishments were interviewed. The study included in-depth interviews with nearly 100 firm owners and trade association representatives and testimony from public hearings held across the state.

Overall Annual DBE Goal

Caltrans must develop an overall goal for DBE participation whether or not it implements race- or gender-conscious measures to achieve that goal. Its current overall DBE goal is 10.5 percent. The Federal DBE Program requires a "base figure analysis" and consideration of any "step 2" adjustments in deriving an overall annual goal for DBE participation in federally-funded contracts.

Analysis of MBE/WBE availability. About one-third of firms surveyed in the California transportation contracting industry were owned by minorities or women. In the availability analysis, BBC examined type, contract role, location and size of work involved in federally-funded projects

and the relative availability of minority-, women- and majority-owned firms to perform that work. BBC determined that 17.6 percent of dollars on federally-funded contracts would be expected to go to minority- and women-owned firms (MBE/WBEs) based on these factors.

The 17.6 percent figure refers to availability of all minority- and women-owned firms, not just firms that appear to meet the federal guidelines for disadvantaged business enterprises (49 CFR Sections 26.65 and 26.67). After accounting for minority- and women-owned firms that might be too large to meet certification requirements, the availability analysis indicates a figure of 13.5 percent DBE utilization for the base figure.

Caltrans should consider 13.5 percent DBE participation as a base figure for its overall DBE goal.

Marketplace conditions and adjustments to the overall DBE goal. Caltrans might consider adjustments to its overall DBE goal through a “step 2” process outlined in the federal regulations.

There are reasons that Caltrans might consider downward adjustments to the base figure. For example, it will be difficult for Caltrans to encourage the many non-DBE-certified firms to apply for certification (the 13.5 percent figure for overall DBE utilization is predicated on non-certified firms seeking DBE certification).

There are also reasons that Caltrans might consider upward adjustments to the base figure. Information on the California marketplace indicates barriers to entry for minorities and women into the California construction and engineering industries, low rates of business ownership for certain groups working in the industries, lower business earnings for minority- and women-owned firms and other barriers, such as access to capital.

Whether or not the Annual Goal can be Achieved through Neutral Means

The Federal DBE Program requires Caltrans to assess the percentage of its overall annual DBE goal that can be achieved through neutral means, and if necessary, the percentage to be achieved through race- and gender-conscious measures. Much of the disparity study focused on information concerning participation of minority- and women-owned firms in transportation contracts with and without DBE contract goals.

Evidence of disparities when Caltrans implements an all-neutral program. BBC compared utilization and availability of minority- and women-owned firms for both state-funded and federally-funded transportation construction and engineering contracts.¹

State-funded contracts. Caltrans operates a solely neutral program for state-funded transportation construction and engineering contracts. BBC determined that 19.3 percent of contract dollars for state-funded contracts from 2002 through 2006 would be expected to go to minority- and women-owned firms. Over this time period, 11.4 percent of state-funded contract dollars went to minority- and women-owned firms, far short of the 19.3 percent benchmark for these contracts.

¹ BBC included non-DBE-certified firms as minority- and women-owned in the disparity analysis to accurately assess whether or not there were differences in contracting outcomes for specific race/ethnic/gender groups.

The disparity index for state-funded contracts is 59 when “parity” is an index of 100.² A disparity index of 59 means that MBE/WBE utilization on state-funded contracts reached only 59 percent of what would be expected based on relative MBE/WBE availability for these contracts. An index below 80 has been deemed by some courts to constitute a “substantial disparity.”

Effectiveness of the DBE contract goals program. Utilization of minority- and women-owned firms on federally-funded contracts from 2002 through April 2006 (with DBE contract goals) was higher than utilization of MBE/WBEs on state-funded contracts. As shown in Figure ES-1, the disparity index for MBE/WBE utilization on federally-funded contracts through April 2006 was 83, higher than the 59 index found for state-funded contracts. Even with DBE contract goals, however, MBE/WBE utilization did not reach “parity.” MBE/WBE utilization was 14.7 percent, lower than the 17.6 percent expected based on MBE/WBE availability for these contracts. A number of business owners reported that some prime contractors abused the past good faith efforts process related to Caltrans’ DBE subcontracting goals program.

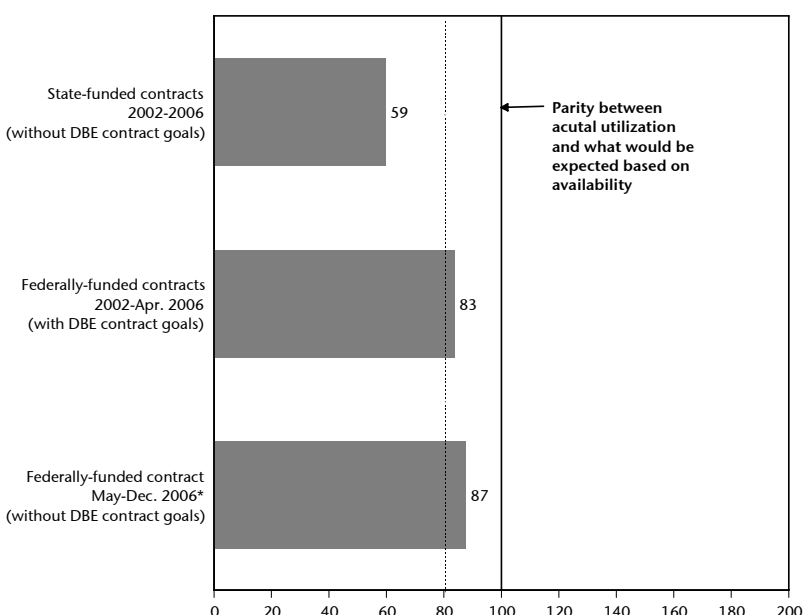
Figure ES-1.
Disparity indices for
MBE/WBE utilization as
prime contractors and
subcontractors on
Caltrans and local
agency transportation
construction and
engineering contracts

Note:

* Note that only 192 prime contracts and subcontracts were examined in this time period.

Source:

BBC Research and Consulting, 2007.



Federally-funded contracts after May 1, 2006. Caltrans discontinued DBE contract goals on May 1, 2006. Based on the limited number of federally-funded prime contracts and subcontracts for May through December 2006 (only 192), overall MBE/WBE utilization showed little change following adoption of an all race- and gender- neutral program. Overall MBE/WBE utilization for federally-funded contracts was 13.4 percent for May through December 2006. The disparity index for MBE/WBE utilization on federally-funded contracts was 87 for the May through December 2006 period, not a substantial disparity.³

² The index of 59 is calculated by dividing 11.4 percent actual utilization by the 19.3 percent benchmark for MBE/WBE utilization for these contracts.

³ Even though actual MBE/WBE utilization was slightly lower, the disparity index was closer to 100 for May-December 2006 contracts than for 2002-April 2006 federally-funded contracts because the benchmark for MBE/WBE utilization for May-December 2006 contracts, 15.5 percent, was also lower than calculated for 2002-April 2006 contracts.

These utilization and availability statistics pertain to all MBE/WBEs whether or not they were DBE-certified. Only examining utilization of certified firms, DBE participation on federally-funded contracts was 9.0 percent from 2002 through April 2006 and dropped to 4.9 percent for May through December 2006. It is too early to tell whether or not overall MBE/WBE utilization will also decline for federally-funded contracts without DBE project goals.

Other disparity analysis. BBC conducted disparity analysis by specific types of contracts by race/ethnicity/gender ownership of firms. Disparities between utilization and availability are most severe for African American-, Asian-Pacific American- and Native American-owned firms. Based on the Ninth Circuit decision in *Western States Paving v. WSDOT*, if Caltrans chooses to implement any race- or gender-conscious remedies, it should review the evidence for each minority group and for women to determine the specific groups eligible for certain remedies.

Qualitative information. Qualitative information included reports by some minority and female business owners that they had been treated differently because of their race or gender. Business owners also identified disadvantages related to the size and age of their firms.

Firm owners recommended changes to Caltrans contracting practices and other assistance that would further open contracting opportunities to small firms including minority- and women-owned firms. For example, contract sizes and bonding requirements for Caltrans construction work often preclude small firms that bid as primes in the private sector from pursuing Caltrans prime contracts. It was also reported that Caltrans favors large engineering firms with substantial Caltrans experience for its engineering work. Firms owners complained that they could not win Caltrans work as prime consultants if they were not allowed to establish a track record with Caltrans.

Caltrans implementation of neutral programs. The Federal DBE Program requires Caltrans to meet the maximum feasible portion of its overall goal by using race-neutral means of facilitating DBE participation (49 CFR Section 26.51). Results of BBC's review include the following:

1. Caltrans has implemented some of the types of neutral remedies suggested in the Federal DBE Program but not others.
2. Some neutral remedies are in place in some districts or regions of the state but not others.
3. Many of the barriers reported by minority- and women-owned firms call for neutral responses such as:
 - Smaller contracts;
 - Better outreach and communication;
 - Additional technical assistance to small businesses and DBEs;
 - Redesigning contractor and consultant selection practices to provide more opportunities for small businesses seeking construction and engineering prime contracts; and
 - Surety bonding programs and other assistance to small businesses and DBEs.

4. Caltrans' past implementation of the Federal DBE Program did not bring utilization of minority- and women-owned firms on federally-funded contracts to the level expected based on relative availability of MBE/WBEs for this work, and was not effective in removing barriers to prime contract opportunities.
5. Additional actions such as developing a bidders list and improved data collection, tracking and reporting are necessary to be able to fully measure success and effectiveness of neutral measures in creating opportunities for minority- and women-owned firms.

Caltrans should consider results of the disparity analysis, marketplace information, qualitative information and analysis of remedies in determining whether any portion of the overall annual goal for the next fiscal year should be achieved through race- or gender-conscious means.

Measures to Implement the Program

In the 2002 through April 2006 study period, Caltrans' DBE race- and gender-conscious program did not fully address disparities between utilization and availability of minority- and women-owned firms on federally-funded contracts. Strong new measures are needed, especially programs to assist development of minority- and women-owned businesses and to open both prime contract and subcontract opportunities to smaller businesses. Caltrans should do more to remove barriers to the utilization of emerging and more developed MBEs and WBEs.

Business owners, trade association representatives and others recommended specific contracting improvements and assistance efforts. Because of its size and opportunities for innovation at the district level, Caltrans can evaluate "best practices" in certain districts and expand them across the organization. Other actions may require state legislation as well as coordination with other state agencies, local governments and private sector partners. These initiatives will require additional resources. Caltrans must continue to work as a partner with USDOT in these efforts.

Caltrans needs additional metrics to track success beyond those suggested in the Federal DBE Program, including careful tracking of MBE/WBE participation (not just DBE utilization) in both federally-funded and state-funded contracts. Caltrans must refine its data collection systems in collaboration with local agencies, and devote additional resources to data collection efforts. These steps are critical for Caltrans to ensure that it is not an active or passive participant in race or gender discrimination against minority- and women-owned firms.